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January 25, 2012

By Email (pcd@ci.bainbridge-island.wa.us)

City of Bainbridge Island
Planning Commission
280 Madison Avenue North
Bainbridge Island, WA 98110

Re: Point Monroe Community Proposal -- Bainbridge Island Shoreline Master
Program Update (Staff Memos, January 10, 2012 and January 20, 2012)

Dear Members of the Planning Commission:

We represent Nancy Strehlow, who owns several developed and undeveloped properties on Point Monroe (the "Sand Spit").

The Point Monroe Community retained R.W. Thorpe & Associates to come up with a proposal to submit to City Staff. The proposal addresses regulation of existing and future development on the Sand Spit under the proposed new Shoreline Master Program ("SMP").

Generally, Ms. Strehlow supports the Community Proposal based upon the unique conditions on the Sand Spit, including the highly built environment and historic small lots. In addition, accepted, proven techniques are available to mitigate impacts. However, Ms. Strehlow has concerns with at least one aspect of the Community Proposal as she understands it. I will focus on her major concern at this time, which is labeling existing development "nonconforming." See Proposal Section 3.1.6.4 ("Nonconforming Development").

A nonconforming use or development is one that would not be approved as a new development under existing laws, but was lawfully established or constructed. Included are developments, uses and lots that were legally established prior to the effective date of the proposed SMP and do not conform to current lot size standards, setbacks or buffers. WAC 173-27-080 provides a standard definition of a nonconforming use or development if a local government does not have one in its existing SMP:

Nonconforming use or development means a shoreline use or development lawfully constructed or established prior to the effective date of the act or applicable master program ... which does not conform to present regulations or standards.

The Washington Administrative Code also addresses nonconforming lots:

An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to

the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

Many people, including capable planners and lawyers, believe that by labeling an existing structure or use "nonconforming," it is grandfathered and safe. Nothing could be further from the truth. Unless tempered by thorough, well thought out regulations, an accurate description of the legal effect of a "nonconforming" status is "illegal but tolerated for now." In this regard, note Staff's comment in its January 20, 2012 Memo to the effect "Why should there be a policy encouraging maintaining nonconforming structures?"

The Department of Ecology has stated in writing that the purpose of the SMA's nonconforming use provisions is to phase out nonconforming uses and structures, such to bring all development and use up to current standards. See **Exhibit A**. Confronted with this position, Ecology officials have issued a more vaguely worded "explanation" that "Ecology does not expect nor is it asking local governments to eliminate all nonconforming development from shorelines." See **Exhibit B**. That does not provide much comfort when under the plain meaning of the State shoreline regulations, and case law, nonconforming uses and structures are at high risk of being phased out, especially structures which are totally destroyed by fire or some other perturbation. See BIMC § 16.12.390(2)(c), imposing time requirements to rebuild a damaged or destroyed structure.

The 2010 Legislature sought to provide some relief to the harsh consequences of a "nonconforming" status. It enacted Engrossed House Bill 1653 which specifies that where a city or a county has integrated its Growth Management Act CAO with its SMA SMP to protect critical areas within shorelines of the State, until the Department of Ecology approves a new master program update or segment of the SMP, a "use" or development which is "legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified" under certain circumstance. Specifically, the use may be continued or modified if:

(A) The redevelopment or modification is consistent with the local government's master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas.

The relief provided by the Legislature in 2010 is interim and specific only to GMA/SMA integration and regulation of critical areas. Reacting to this vacuum, the 2011 Legislature provided property owners additional relief, enacting the Laws of 2011, Chapter 323. This law amends the Shoreline Management Act, promulgating a new section which reads:

New or amended master programs — Authorized provisions.

(1) New or amended master programs approved by the department on or after September 1, 2011, may include provisions authorizing:

(a) Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and

(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.

(2) For purposes of this section, "appurtenant structures" means garages, sheds, and other legally established structures. "Appurtenant structures" does not include bulkheads and other shoreline modifications or over-water structures.

(3) Nothing in this section: (a) Restricts the ability of a master program to limit redevelopment, expansion, or replacement of over-water structures located in hazardous areas, such as floodplains and geologically hazardous areas; or (b) affects the application of other federal, state, or local government requirements to residential structures.

RCW 90.58.620.

As you can see, under the new law, the City of Bainbridge Island has discretion when updating its SMP Update to declare existing development "conforming," that is, "permitted." This status is in lieu of a "non-conforming" label. "Permitted" is a much fairer status to property owners than "legally nonconforming." Thus, at a minimum, Ms. Strehlow urges the Planning Commission to recommend that the City Council implement Chapter 123, Laws of 2011.

The approach allowed by RCW 90.58.620 is consistent with the Shoreline Management Act's general goals, which call for coordinated planning "... while, at the same time, recognizing and protecting private property rights consistent with the public interest" RCW 90.58.020.

It is also consistent with the Comprehensive Plan. The Bainbridge Island Comprehensive Land Use Plan states as one of its goals that the City will preserve "...a reasonable use of the land for all land owners." One of the "Five Overriding Principles that Guide the Plan" include that "the costs and benefits to property owners should be considered in making land use decisions." Under the Plan's Land Use Element, Goal 5, the Comprehensive Plan states:

Strive to ensure that basic community values and aspirations are reflected in the City's planning program while recognizing the rights of individuals to use and develop private property in a manner that is consistent with City regulations. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Bainbridge Island Comprehensive Plan, Land Use Element, p. 5.

Thank you for your kind attention to these comments and the enclosures.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE



Dennis D. Reynolds

Attachments

cc: Nancy Strehlow (by email)
Ryan Ericson, Associate Planner-Shoreline (by email reicson@bainbridgewa.gov)
Libby Hudson, Manager, Long Range Planning (by email lhudson@bainbridgewa.gov)

DDR/cr

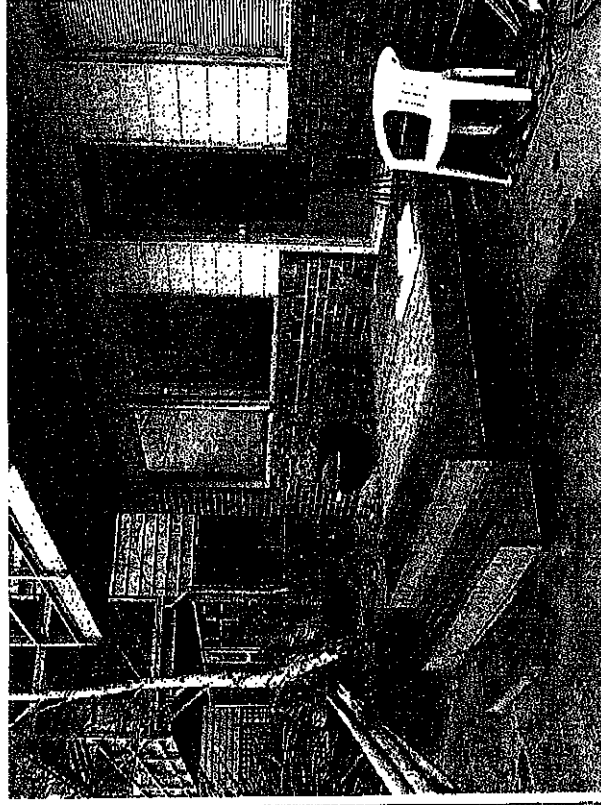
EXHIBIT A

Nonconforming Uses and Structures

Washington Dept. of Ecology
Betty Renkor
October 25, 2007

Nonconforming structures

Beach Drive house

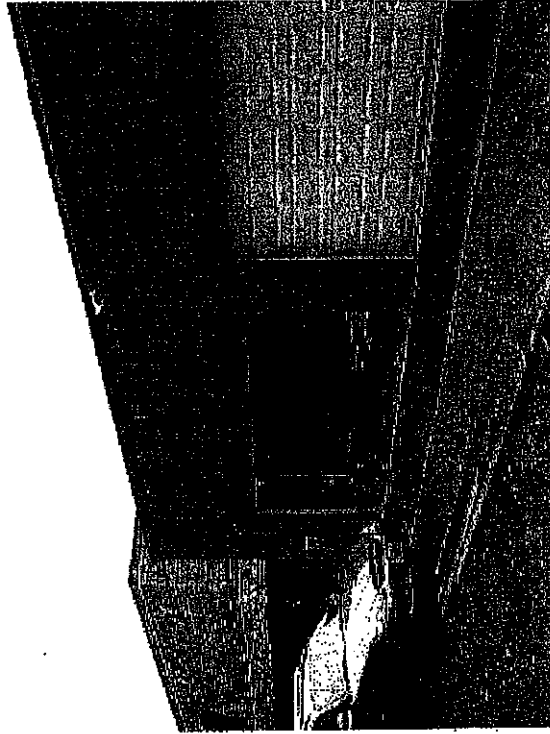


• Beach Drive beach



Nonconforming structures

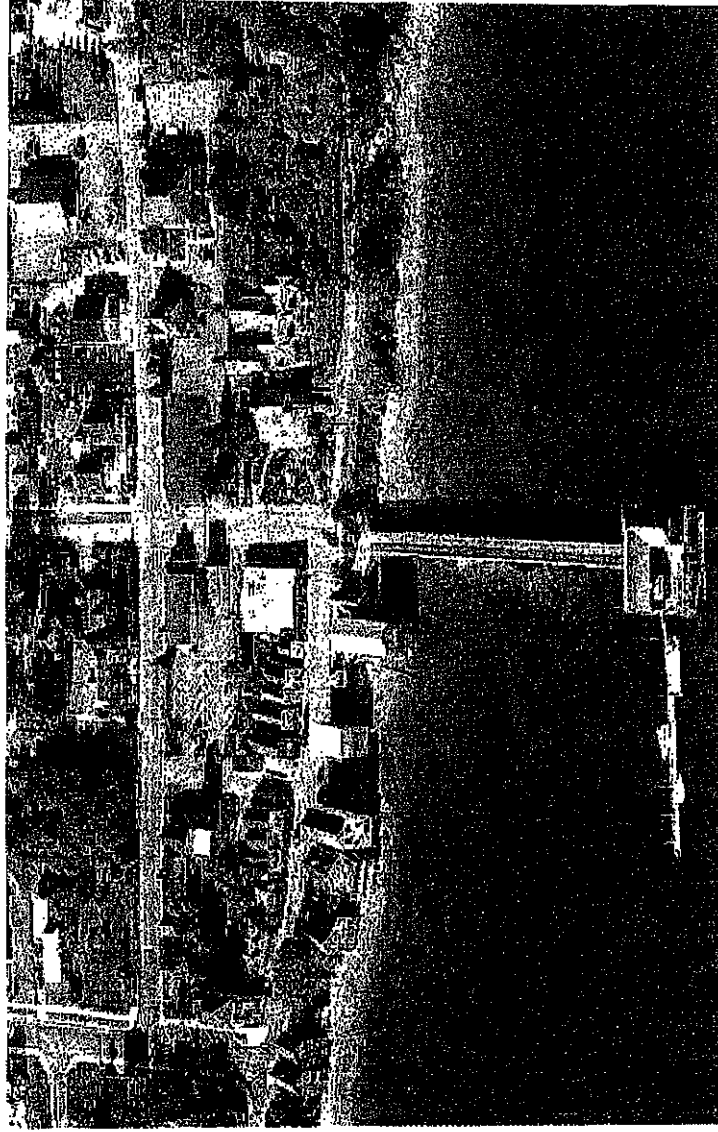
- North Vashon garage



- North Vashon beach



Nonconforming structures



Nonconforming and SMPs

- Isn't this in the WAC?
- Yes, but... (applies only if your SMP doesn't cover it)
- Your SMP can be different than WAC

Nonconforming and SMPs

- Basic information
- SHB and court cases
- WAC 173-27-080
- Permits
- SMP examples
- Considerations

Nonconforming basics

- Lawfully established or built
- Prior to effective date of SMA/SMP
- Do not conform to current SMP
 - Use - no longer allowed in environment
 - Structure –inconsistent with bulk, setback, height, density
- Not consistent w/ community vision

Nonconforming basics

- Can continue to exist
- Long term goal: eliminate
- Nonconformity cannot increase
- Abandoned: NC status expires
- Reality: many exist for a long time

SHB and Court cases

- Rhod-a-zalea v. Snohomish County
 - NC uses disfavored; restrict so they phase out
- Jefferson Co. v. Seattle Yacht Club
 - NC uses disfavored
- SHB 95-6
 - If setbacks not intended to phase out residential use, invites piecemeal granting of variances

SMA & Guidelines

- SMA: silent on nonconforming
- Guidelines: address nonconforming uses and properties (WAC 173-26-191(2)(a)(iii)(A))

WAC 173-27-080

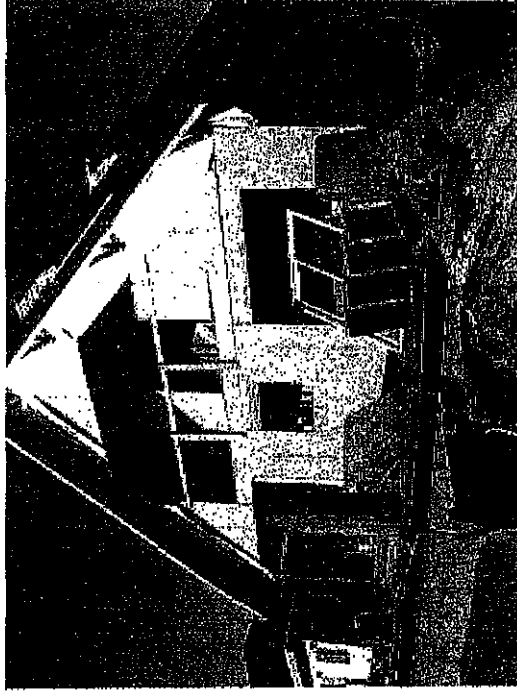
- Conforming use, NC structures
 - OK to maintain & repair
 - Can expand, but not increase extent of nonconformity
- NC uses cannot expand, except for SFR
- Structure that needed variance
 - Legal nonconforming structure
 - NC regulations apply

WAC 173-27-080

- NC development that is damaged
 - Up to 75%, may be rebuilt to prior configurations
 - Apply within 6 months
 - Complete restoration within 2 years of permit
- NC use that is discontinued
 - NC rights expire
 - Subsequent use shall be conforming

Recent permits

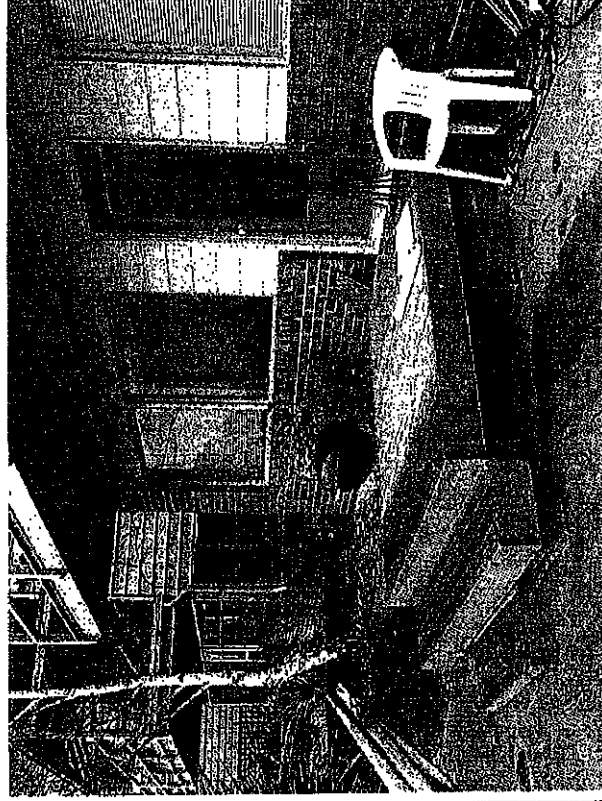
- Snohomish County



- Proposal – add 2nd story, unheated attic, same footprint
- New house underway
- Ecology denied variance
- SHB
 - Adding 16' of height increases encroachment
 - Setback line extends into the air

Recent permits

- West Seattle



- Proposal – Add partial 3rd story, additions
- Stringline setback – nearest shoreline corners
- SMP – No expansion in any manner that increases extent of NC
- Ecology denied variance

SMP examples

- Bellingham
 - CUP needed to expand NC structure
 - No expansion toward shoreline
 - Must meet 35–ft height restriction
 - No increase in impervious surface
 - Commercial – public access, restoration may be required
 - Residential - buffer enhancement may be required

SMP examples

- Port Townsend
 - NC use discontinued for 365 continuous days loses NC status
 - NC structure damaged more than 50% replacement cost must conform to SMP to be restored
 - NC residential structures destroyed may be rebuilt
 - Commercial, marine, etc. – interior, nonstructural changes OK, limited to 50% replacement cost over 5 years

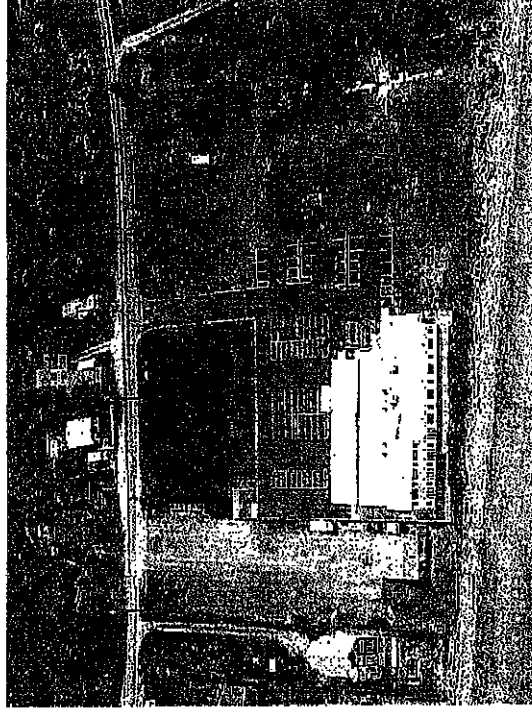
SMP examples

- Whatcom County

- Expansion of SFR needs CUP
- Can go upland & into side yards
- No expansion waterward or into side yard setback
- Can go higher if meet view blockage requirements
- Buffer planting needed
- Expanding waterward, into side yard setback or above height standards needs variance

SMP examples

- Pt. Roberts salmon cannery



- Whatcom proposed SMP revisions
 - CUP to require public access, beach planting
 - Hotel/restaurant - change roofline, water views for guests

Considerations

- Vashon shoreline



- Shoreline with lots of NC structures
- Is variance needed for new development
- Consider appropriate designations and regulations

Considerations

- Address nonconforming regulations in cumulative impact analysis
- Is no net loss achieved?
- Time frame for abandonment
- Maximum % destroyed & allowed to rebuild
- What does zoning code allow?
- NC structures can be rebuilt to same footprint & height prior to destruction

Conclusion

- Guidelines allow some flexibility
- Nonconformities need to be managed
- Think it through; show your work
- Ecology considers statewide interest, public access, habitat restoration

EXHIBIT B

Shoreline Master Program Updates:

Nonconforming uses and development guidance

General concepts

This document provides background information on regulation of nonconforming uses and development in Washington. It includes the Department of Ecology standards for nonconforming uses and development, reviews relevant court and board cases, and provides examples of custom nonconforming provisions in Shoreline Master Programs (SMP) that Ecology has approved. "Nonconforming" uses and development were lawfully constructed or established, but do not conform to current land use regulations or standards. The creation and regulation of nonconforming uses and development are old issues, beginning early in the 20th century, when municipalities started enacting zoning regulations.

The regulation of nonconforming development sometimes becomes a contentious issue in municipalities that are updating their SMPs. New buffer requirements, shoreline environment designations and other regulations may result in existing structures being nonconforming with the new SMP. A core issue is balancing the public interest related to nonconforming land uses and development with the rights of private property owners.

The term, "nonconforming use" is often used to mean both uses and development or structures. This guidance refers to use, development or structures, and lots.

- A use is nonconforming if it would not be approved under the current regulations. An example is a commercial use within an area designated for residential uses.
- A development or structure is nonconforming if it is located or configured in ways that do not meet current standards. A common example along shorelines is a single-family residence that does not meet current setback standards. In these cases, the use is consistent with the shoreline regulations, but the structure does not meet one or more standards in the existing regulations. Piers and docks that are larger than the current regulations allow also are examples of nonconforming structures.
- Lots that were legally established prior to the effective date of the current SMP and do not conform to the current lot size standards also are nonconforming.

Washington statutes and case law

Within the general framework of the Constitution and case law, Washington State local governments have significant flexibility to address nonconforming issues. Historically, nonconforming uses and development have not been addressed by State legislation in Washington.

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However, in March 2010, the Governor signed EHB 1653, which adds special provisions to the Growth Management Act (GMA) regarding existing uses in Shoreline areas. First, the bill clarifies that critical areas regulations adopted under the GMA remain in effect within shoreline jurisdiction until Ecology adopts a comprehensive SMP update or SMP amendment specifically related to critical areas.

The bill also provides that *legally existing structures and uses within critical areas buffers in shoreline jurisdiction are considered to be "conforming" under the GMA, and may continue during the time the critical areas regulations remain in effect. Special provisions are included regarding change or expansion of these existing uses. More information is available at <http://www.ecy.wa.gov/programs/sea/sma/news/reconsider.html>)*

Hearings boards and courts in Washington have dealt with the nonconforming development issue under the Shoreline Management Act (SMA) and other land use statutes for more than three decades.

The situation as described by the Washington Supreme Court in one decision:

While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. ...Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. 136 Wn.2d 1, Rhod-A-Zalea v. Snohomish County. (Emphasis added)

Ecology shoreline regulations

Not all of the SMPs adopted in the 1970s and early 1980s included clear provisions for nonconforming development. To ensure clarity, Ecology adopted nonconforming development regulations in 1986 in the former WAC 173-14. These regulations were revised and then incorporated in the updated WAC 173-27-080 in 1996. These regulations apply at the local level only if the local SMP does not address nonconforming development.

The Ecology standards reflect the basic policy expressed in several Washington court decisions and the policy of the SMA to provide for preferred uses and protect shoreline habitat.

For purposes of shoreline management under the SMA, nonconforming use or development is defined as:

" a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program (WAC 173-27-080(1)).

The WAC also addresses nonconforming lots:

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

The WAC nonconforming regulations are provided below.

WAC 173-27-080

Nonconforming use and development standards

When nonconforming use and development standards do not exist in the applicable master program, the following definitions and standards shall apply:

(1) "Nonconforming use or development" means a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program.

(2) Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

(3) Uses and developments that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses. Such uses shall not be enlarged or expanded, except that nonconforming single-family residences that are located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main structure or by the addition of normal appurtenances as defined in WAC 173-27-040 (2)(g) upon approval of a conditional use permit.

(4) A use which is listed as a conditional use but which existed prior to adoption of the master program or any relevant amendment and for which a conditional use permit has not been obtained shall be considered a nonconforming use. A use which is listed as a conditional use but which existed prior to the applicability of the master program to the

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site and for which a conditional use permit has not been obtained shall be considered a nonconforming use.

(5) A structure for which a variance has been issued shall be considered a legal nonconforming structure and the requirements of this section shall apply as they apply to preexisting nonconformities.

(6) A structure which is being or has been used for a nonconforming use may be used for a different nonconforming use only upon the approval of a conditional use permit. A conditional use permit may be approved only upon a finding that:

(a) No reasonable alternative conforming use is practical; and

(b) The proposed use will be at least as consistent with the policies and provisions of the act and the master program and as compatible with the uses in the area as the preexisting use.

In addition such conditions may be attached to the permit as are deemed necessary to assure compliance with the above findings, the requirements of the master program and the Shoreline Management Act and to assure that the use will not become a nuisance or a hazard.

(7) A nonconforming structure which is moved any distance must be brought into conformance with the applicable master program and the act.

(8) If a nonconforming development is damaged to an extent not exceeding seventy-five percent of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.

(9) If a nonconforming use is discontinued for twelve consecutive months or for twelve months during any two-year period, the nonconforming rights shall expire and any subsequent use shall be conforming. A use authorized pursuant to subsection (6) of this section shall be considered a conforming use for purposes of this section.

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

Nonconforming uses and development in an SMP

Owners of property within shoreline jurisdiction are sometimes concerned about having a "nonconforming" label on their property use or structure. Their concerns and questions may include:

- Can they expand the size of their house or add a driveway or garage?
- Can they repair and maintain their house or office building?
- Can they continue the existing use, such as a retail shop, or will they need to close and move?

SMPS should include provisions to address situations where uses and properties become nonconforming (WAC 173-26-191(2)(a)(iii)(A). However, Ecology does not expect, nor is it asking, local governments to eliminate all nonconforming development from shorelines. Some nonconforming uses and structure within shoreline jurisdiction have existed for many years.

Options for addressing nonconforming situations include:

- Use the tried and tested nonconforming standards in WAC 173-27-080.
- Use some provisions of WAC 173-27-080 and revise others to meet local needs.
- Write new nonconforming provisions.
- Use the same nonconforming provisions that are in the local zoning code. This will provide consistent treatment of nonconforming uses and development within and outside shoreline jurisdiction.

If your SMP does not include regulations regarding nonconforming development, WAC 173-27-080 will apply within your municipality's shoreline jurisdiction.

General "sideboards"

SMP language should be within the parameters of case law on nonconforming development. (For your convenience, some of those cases are discussed below.) The basic general "sideboards" for nonconforming development regulations include:

- "Grandfathered" (nonconforming) existing legal uses and structures may continue.
- Owners of grandfathered structures that wish to expand the structure may be able to do so if they do not increase the nonconformity. For example, a house partially within the buffer could be expanded outside the buffer.

- Regulations must be applied fairly to new development and existing development. Local governments cannot excuse existing neighborhoods from meeting new standards while enacting new standards for new development.
- Local governments have the right to terminate nonconforming development. (On occasion, an existing use may have a high potential for use conflicts, such as a fuel storage facility within a city's wellhead protection zone. In these cases, a specific time may be set for the use to be amortized and removed.)
- As reflected in case law, local governments may adopt regulations to phase out nonconforming development over time. More commonly, phasing out is accomplished by adopting disincentives such as strict limits on change of use or expansion.
- For updated SMPs, the "no net loss" policy objective should guide review of proposed expansions or other changes to grandfathered uses and new development on substandard vacant lots.
- SMPs need to cover the breadth of the nonconforming provisions that are in WAC 173-27-080, including:
 - Definitions.
 - Structures – maintenance and repair, expansion, moving the structure.
 - Uses – expansion, change in use,
 - Reconstruction after damage, including timelines for permitting and reconstruction. Ecology suggests that SMPs include criteria to avoid reconstruction in hazard areas.
 - Abandonment.
 - Undeveloped lots.

The nonconforming provisions in an SMP should distinguish nonconforming uses from nonconforming structures. A nonconforming structure may contain a conforming use. For example, a single family residence in a Shoreline Residential environment is a conforming use. If it is located within the shoreline buffer, it is a nonconforming structure but still a conforming use.

Benign or detrimental nonconformities

A recent *Zoning Practice* article suggests that local governments consider whether nonconforming developments are "benign" or "detrimental" and develop separate regulations for development falling within these categories. This may help determine whether nonconformities should be terminated over time or allowed to continue. ("Distinguishing Between Detrimental and Benign Nonconformities," V. Gail Easley and David A. Theriaque, *Zoning Practice*, November 2009, Issue No. 11, American Planning Association.) However, in critical area buffers and shorelines, the cumulative impact of numerous minor or lesser impacting "benign" developments should be considered.

No net loss of ecological functions

SMPS must, over time, achieve no net loss of shoreline ecological functions. The SMP update process will include a cumulative impacts analysis and no net loss report that show how the SMP will achieve no net loss.

Nonconforming regulations must be included in those analyses. If the draft SMP would allow single family residences to be built on nonconforming lots, the analyses should reflect how no net loss will be achieved despite such development. The potential expansion of nonconforming development such as residences or other structures such as piers and docks, commercial or industrial buildings also should be included in the no net loss analyses.

Court cases and Shorelines Hearings Board cases

Some key points from the following Court and Shorelines Hearings Board (SHB) cases:

- Washington state laws do not address the regulation of nonconforming development, and leave this issue primarily to local governments to resolve.
- Nonconforming development (uses and structures) is generally disfavored.
- Nonconforming development is routinely allowed to continue, at least for some time.
- A nonconforming status grants the development the right to continue to exist, but does not assure the right to significantly change, enlarge or alter the development.
- Limited expansion of a nonconforming structure might be permissible because it is tied to other actions to bring the overall use into conformity (e.g., upgrade of nonconforming septic system).
- Local ordinances can terminate nonconforming development that is abandoned or presents a hazard, or provide for it to cease over time.
- The language in the SMP is critical to the resolution of SHB and Court cases.

Some Court and Shorelines Hearings Board cases that are applicable to nonconforming development regulations in an SMP include those shown below.

136 Wn.2d 1, Rhod-A-Zalea v. Snohomish County: In this case, the Washington Supreme Court supported Snohomish County's decision to require a grading permit for an existing nonconforming peat mining operation. The paragraphs below, taken from the case, discuss the theory of zoning in regards to nonconforming use and Washington State laws silence on the regulation of nonconforming use.

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it

does not comply with the zoning restrictions applicable to the district in which it is situated. See 1 Robert M. Anderson, American Law of Zoning § 6.01 (Kenneth H. Young ed., 4th ed. 1996.)

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. Id. at 220. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. Id. at 218. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. Id. Moreover, zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions. See R. SETTLE, WASHINGTON LAND USE § 2.7(d).

While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. See R. SETTLE, WASHINGTON LAND USE § 2.7(d). Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. See id.

Meridian Minerals v. King County, 61 Wn. App. 195 (1991): The Washington Supreme Court supported King County's decision to withhold a permit for expansion of a nonconforming rock quarry. Language from the decision discusses nonconforming uses.

The various owners of the Veazie Valley quarry have been allowed to continue a nonconforming use since 1958. That use can continue as long as it remains similar in kind to the use that became vested, the use at the time zoning occurred. Although railroad use of rock may have declined over the years and BNRR may be one of the last to need rock from the quarry, Washington has long adhered to the policy of phasing out nonconforming uses. Anderson; Bartz; Coleman v. Walla Walla, 44 Wn.2d 296, 266 P. 2d 1034 (1954); Cain. The generally accepted method of eliminating nonconforming uses "is to prevent any increase in the nonconformity and, when changes in the premises are contemplated . . . to compel . . . a lessening or complete suppression of the nonconformity". Anderson, at 323 (quoting 147 A.L.R. 167, at 168. The use of the quarry, not its ownership, was at issue when BALD declined to process Meridian's permit application.

Jukanovich v. Ecology, SHB No. 06-013: In this summary judgment, the Shorelines Hearings Board supported Ecology's denial of a variance for reconstruction of a house within the shoreline setback.

While it is true that the house has not been moved closer to the water on the ground level, nor has the footprint changed, the Board concludes that adding nearly sixteen and one-half feet

of height to the house, as well as creating additional interior square footage, enlarges, intensifies, and increases the encroachment of the house within the setback. The Board agrees with Ecology that "the setback does not just define a line that runs along the ground, beyond which development is prohibited. The setback line extends up into the air as well, to include the space above the ground." 11. This interpretation is consistent with the definition of "setback" in the SCSMA which states "A required open space, specified in shoreline master programs, measured horizontally upland from and perpendicular to the ordinary high water mark." SCSMA, p. J-9. See also SCC 30.23.100(2) ("every required setback shall be open and unobstructed from the ground to the sky except for trees and other natural vegetation.")

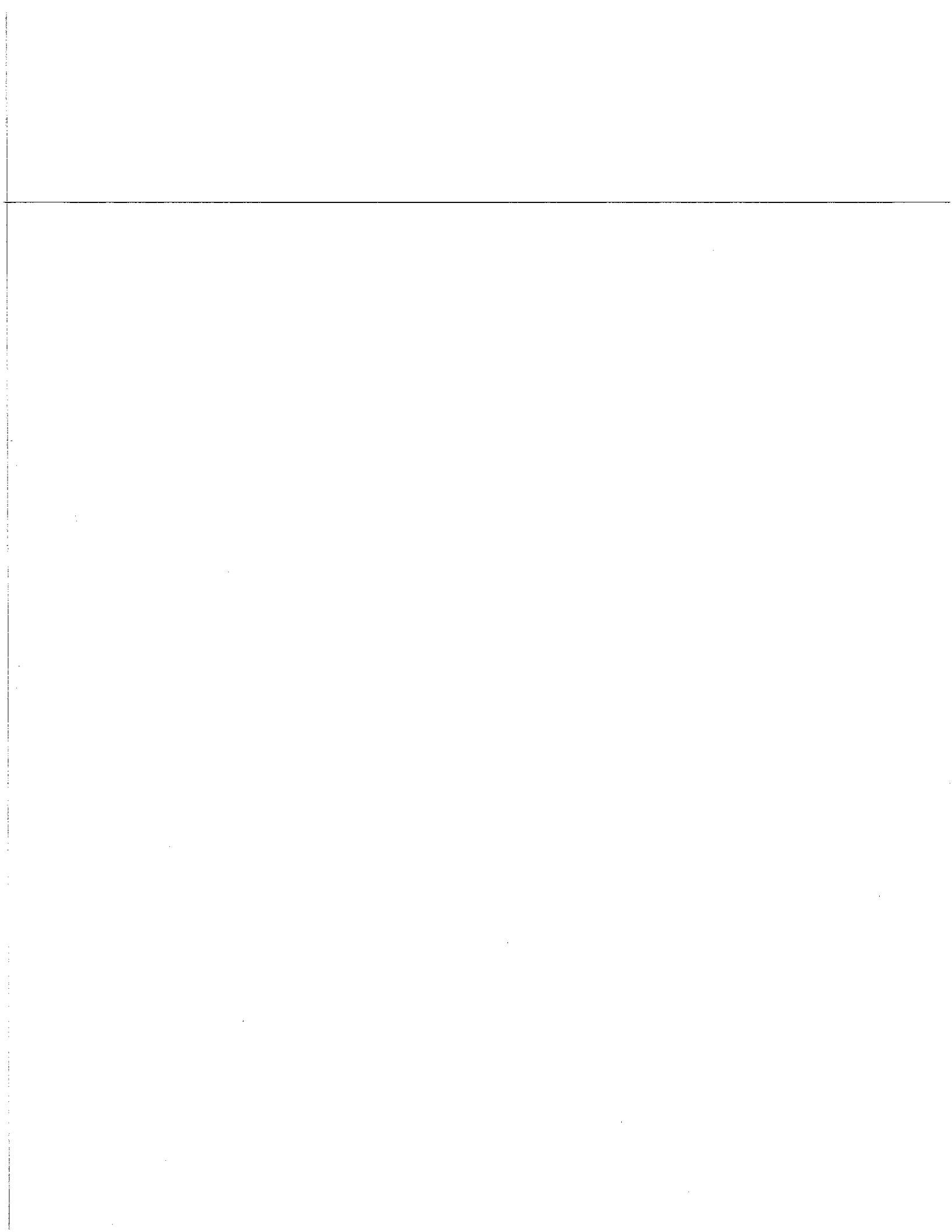
Garlick et.al. v Eiford et.al., SHB No. 95-6: This SHB case is a relevant decision to nonconforming residential structures. The decision states that nonconforming structures and uses are disfavored. The Board approved increasing the size of the home in the setback to allow a two-car garage although it approved a size increase that was less than requested by dis-allowing an over-the-garage living space.

While we recognize that the overall policy of the SMA favors single family residences, we believe that the establishment of setback lines which create non-conforming development in existing neighborhoods, are logically intended to phase out the residential use within the setback area. If this is not the ultimate goal, these setback requirements are of little consequence, other than to invite the piecemeal granting of variances, until the setback becomes a nullity. The WCSMP is consistent with the concept of limiting the expansion of non-conforming development. Section 23.50.92, for example, restricts repair of non-conforming developments to work which will not increase the non-conformity. Section 23.50.93 similarly restricts the reconstruction of any pre-existing non-conforming developments. It would be inconsistent with the liberal construction of the SMA to deduce from these sections that proposals to expand non-conforming residential development may be approved, based on the personal desires of the applicant.

73 Wn. App. 576, Jefferson Cy. v. Seattle Yacht Club, 1994: The Court of Appeals remanded to the SHB the Superior Court order affirming the SHB's decision to allow a yacht club outstation at Port Ludlow Bay. The Court directed the SHB to reconsider its decision to "reconsider the proposal's compatibility with the area immediately adjacent to the proposed site without considering any nonconforming use."

Because nonconforming uses are disfavored, and because the public policy of this state is to restrict such uses so that they may ultimately be phased out, see, e.g., Keller v. Bellingham, 20 Wn. App. 1, 9, 578 P.2d 881 (1978), aff'd, 92 Wn.2d 726, 600 P.2d 1276 (1979), we believe that nonconforming uses are not precedent for other uses. That is, a finding of compatibility cannot, in our view, be substantially based on the existence of a nonconforming use in the area in question.

Guy Fox v. Ecology, SHB NO. 00-025: In this case, the SHB overturned Ecology's denial of a conditional use permit to enclose a deck as long as the change was linked to installation of a septic system.



First, it is important to note that the enclosure of the deck will not increase the non-conformity. Accord, Gambriell v. Mason County and Ecology, SHB 91-26 (1992) (enclosure of a deck to add a dining room did not increase the nonconformity as the same area that violated the setback was not increased.) The degree to which the nonconforming structures on the Fox property will be over the water will remain the same.

Second, the area around Mr. Fox's property is highly developed with many residential homes that are either over the water or behind nonconforming bulkheads. Many of these residential developments are much further waterward and are much larger in scale than Mr. Fox's very small 10 feet by 13 feet cabin. Allowing Mr. Fox to enclose an existing deck to add a bathroom and expanded kitchen will not grant him a special privilege but will merely make his home more in conformity with the surrounding area.

Third and most importantly, there has been no evidence of any environmental harm that will result from allowing this very modest request. If there is no environmental harm, allowance of this expansion will foster "all reasonable and appropriate uses" and will recognize the preference given to single-family development. RCW 90.58.020.

Stephen and Beverly Davis v. Pierce County and the Department of Ecology, SHB NO. 03-021: In this case, the board said the increasing the footprint of a small cabin that was a nonconforming use and adding a second story, which more than doubled its size, could not be authorized.

Because the 525 sq. ft. cabin is acknowledged as nonconforming use, the structure on the site today cannot be authorized unless the terms for expanding a nonconforming use are met. Expansion of a nonconforming use is addressed in PCC 20.72.050:

Any proposed expansion of a use determined by the Planning Department or the appropriate reviewing authority to be nonconforming shall be permitted provided all of the following criteria are met:

- A. The proposed change will make the use more compatible with the environment in which it is located.*
- B. That water, air, noise and other classes of pollution will not exceed the level customarily found in that particular environment.*
- C. That the public health, safety and welfare will not be adversely affected.*

5.

In this case, doubling the size of the cabin will not make the structure more compatible with the rural residential shoreline environment in which it is located. Allowing expansion of nonconforming structures, without compelling circumstances, would also be adverse to the public welfare (PCC 20.72.050(C)) and the orderly development of shorelines contemplated by the Shoreline Act. (RCW 90.58.020).

Nonconforming language in new SMPs

Local governments that have adopted comprehensive SMP updates since 2004 have addressed nonconforming development in various ways. Below are some examples. Check Ecology's website at <http://www.ecy.wa.gov/programs/sea/shorelines/smp/status.html> for links to SMPs that are approved by Ecology.

Douglas County: Adopted WAC 173-27-080 into its SMP.

City of Marysville: Incorporated the nonconforming provisions of its zoning code into its SMP. The zoning code allows nonconforming structures and uses "to continue in existence, and to be repaired, maintained, remodeled, expanded and intensified, but only to the extent expressly allowed by the provisions of this chapter. It is the purpose of the city to ultimately have all structures and uses brought into conformity with the land use codes and regulations duly adopted by the city, as the same may be amended from time to time. Nonconforming structures and uses should be phased out or brought into conformity as completely and as speedily as possible with due regard to the special interests and property rights of those concerned." (Ord. 2131, 1997). (MCC 19.44.010)

City of Monroe: Adopted WAC 173-27-080 into its SMP.

City of Port Townsend: Adopted nonconforming provisions that address the local shoreline conditions. The nonconforming chapter has separate sections for uses, standards and lots. Change of ownership, tenancy or management does not affect the use's nonconforming status. Additional development of property that includes a nonconforming use requires new uses to conform to the SMP. Nonconforming status is lost if the use is discontinued for 365 continuous days.

Nonconforming structures except for residences that are damaged one-half or more of replacement cost can be restored only if the restoration conforms to the SMP. Residences destroyed by catastrophe and in a residential zone may be reconstructed to the size, density and location that existed prior to the catastrophe. Additional provisions can be found in Port Townsend's SMP.

Whatcom County: The County's new SMP requires a variance for expansion of nonconforming structures, except for single family residences which meet certain requirements. The SMP establishes shoreline buffers of 100 to 150 feet. A small percentage of shoreline lots that are vacant are too small to meet the buffer requirements for new development. The SMP allows for development on these lots that have a building area not located in a hazard area.

The provisions from Whatcom County's SMP provided below show one approach regarding nonconforming structures and lots. Comments in the following section are from Barry Wenger, Ecology Regional Planner at the Bellingham Field Office.

Whatcom County's Non-conforming Development provisions located at Chapter 23.50.07

- D. *Non-conforming structures may be maintained, repaired, renovated, or remodeled to the extent that non-conformance with the standards and regulations of this Program is not increased, provided that a non-conforming development that is moved any distance must be brought into conformance with this Program and the Act; provided further, that as a conditional use a non-conforming dock may be modified, reoriented or altered within the same general location to be more consistent with the provisions of this SMP.*

Comment - The above provision allows structures to be maintained, and minor location adjustments of dock/float structures, to improve consistency with the SMP without defaulting to the current standards. This approach provides an incentive for non-conforming dock owners to make environmental improvements through an administrative conditional use rather than tearing the entire structure out and applying for a shoreline variance that has little chance of approval. An administrative conditional use is only processed by staff before being sent to Ecology for final determination rather than going through a long and expensive Hearing Examiner process at the local level.

- E. *Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act; provided that, non-conforming single family residences may be expanded without a variance where the provisions of SMP 23.50.07.1 apply; and provided further, that non-conforming structures with conforming uses within commercial or mixed-use developments may be expanded or enlarged within the existing building footprint as a conditional use pursuant to Ch 23.100.05.B.1(e).*

Comment - Non-conforming residences that are located in the setback/buffer may be expanded landward, laterally or vertically within the sideyard/height limits via an administrative conditional use, provided the vegetation buffer is tailored and identified for the lot, a notice recorded with the county auditor, and mitigation provided commensurate for any buffer impacts [SMP 23.50.07.1]. Expansion waterward of the existing foundation walls, into the sideyard setbacks, or above the height limit requires a shoreline variance.

Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act; provided that, non-conforming single family residences may be expanded without a variance where the provisions of SMP 23.50.07.1 apply; and provided further, that non-conforming structures with conforming uses within commercial or mixed-use developments may be expanded or enlarged within the existing building footprint as a conditional use pursuant to Ch 23.100.05.B.1(e).

Comment - The second part of Section E allows by conditional use conforming commercial or mixed use development within a non-conforming structure to modify or alter the shape of the structure within the same footprint to meet development needs i.e. change rooflines, add windows, etc. Section 23.100.05.B.1(e) requires public access and restoration be provided with the additional design flexibility.

Non-conforming lots

Comment - Owners of vacant lots that are too small to meet the new setbacks/buffers and are not located in a hazard area may take advantage of the following provision that allows a "building area" disturbance of 2,500 square feet as far from the water as possible, unless a shoreline variance is authorized. In no case shall the new structure be located closer to the water than the existing common-line setback within 50 feet of and between the two adjacent existing residences. The tailored vegetative buffer is required to be identified and provided, a notice recorded with the county auditor's office, and mitigation provided for buffer impacts [SMP 23.90.06.B.3]

- K. *New single family development on non-conforming lots consisting of property under contiguous ownership less than 20,000 square feet in size and not subject to landslide hazard areas, alluvial fan hazard areas, or riverine and coastal erosion hazard areas or associated buffers as provided in WCC 16.16.310 may be allowed without a variance in accordance with the following criteria:*
1. *Non-conforming lots with a building area of 2,500 square feet or more available for a single family residence and normal appurtenances and unrestricted by setbacks or buffers from shorelines or critical areas shall comply with the provisions of this Program. The building area means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping.*
 2. *Non-conforming lots that do not meet the requirement of subsection K.1 above shall provide the maximum setback and buffer dimension feasible while providing for a building area of not more than 2,500 square feet on the portion of the lot farthest from the required setback or buffer; provided that consideration shall be given to view impacts and all single family residences approved under this section shall not extend waterward of the common-line setback as measured in accordance with Appendix F.*
 3. *The area between the structure and the shoreline and/or critical area shall comply with the vegetation conservation standards of SMP 23.90.06.B.3.*
 4. *Development may not take place waterward of the ordinary high water mark.*
 5. *Facilities such as a conventional drainfield system may be allowed within critical areas or their buffers, except wetlands and buffers, outside of the building area specified above, subject to specific criteria in WCC 16.16.*